No. 05-910 JAN 18 2006

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IN THE

# Supreme Court of the United States

STEVEN L. SIMASKO,

*Petitioner*,

v.

PETER R. GEORGE, individually and in his official capacity as St. Clair County Prosecutor, and MARY ROY KELLY, jointly and severally,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. What is the proper standard to apply to claims made by policymaking employees asserting denial of their protected right to free speech and what protection will be given to policymaking employees' right of free speech as set forth in the First Amendment to the U.S. Constitution and cases cited herein?

2. What is the proper standard to apply to claims made by policymaking employees asserting denial of their protected right to intimate association and what protection will be given to policymaking employees' right of intimate associations as set forth in the First Amendment to the U.S. Constitution and cases cited herein?

3. Did Respondents' actions in demoting and constructively discharging the Petitioner in retaliation for Petitioner's refusal to support his co-worker in a judicial race and his refusal to curtail his brother's support of the opponent result in violations of Petitioner's First Amendment rights of free speech and association?

4. Are Respondents, who are both criminal prosecutors, entitled to qualified immunity from personal liability pursuant to § 1983 for their actions in constructively discharging Petitioner in retaliation for exercising his Constitutional rights of free speech and association?

## LIST OF PARTIES AND STATEMENT TO THE COURT OF NO INTEREST

The parties to the proceedings are as listed in the caption. It is Petitioner's belief that Defendant County of St. Clair has no interest in the outcome of this Petition as it was not a party to the proceedings in the United States Court of Appeals for the Sixth Circuit.

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## CITATION OF OPINIONS AND ORDERS

The opinion of the Court of Appeals for the Sixth Circuit in *Simasko v. County of St. Clair* is published at 417 F.3d 559 (6th Cir. 2005) and was decided and filed on August 3, 2005. Petitioner Steven Simasko's Petition For Rehearing *En Banc* and Petition For Panel Rehearing was denied without opinion and the unpublished order was issued October 20, 2005.

The Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment of the United States District Court of the Eastern District of Michigan, Southern Division, in *Simasko v. County of St. Clair, et al.*, Case No. 03-CV-73145-DT, dated September 15, 2004 is unpublished.

## STATEMENT OF THE BASIS FOR JURISDICTION

The order sought to be reviewed was entered on August 3, 2005. The date of the order denying rehearing and rehearing en banc is October 20, 2005.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## STATEMENT OF THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. I: Congress shall make no law . . . abridging the freedom of speech.

U.S. CONST. amend. XIV, § 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1996): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

Petitioner Steven L. Simasko (hereinafter "Simasko") is a former Assistant Prosecutor for Defendant St. Clair County. Until January 1, 2005, Respondent Peter George (hereinafter "George") was the Prosecutor for St. Clair County. George was elected to the position of Prosecutor by a panel of three

Circuit Court judges.[1] Concurrently, Respondent Mary Roy Kelly (hereinafter "Kelly") was the Chief Assistant Prosecutor for St. Clair County. Kelly was appointed to the position of Chief Assistant by George upon his election to the post of Prosecutor.[2] As Chief Assistant, Kelly was Simasko's co-worker and immediate supervisor.

In 2002, Simasko and Kelly, along with others, ran for a judicial vacancy in the 72nd Michigan Judicial District. Simasko announced his candidacy in 2001 and Kelly joined the race some time later. The election was a non-partisan race and Simasko and Kelly opposed each other in the primary. George supported Kelly in the election. Simasko lost in the primary. Kelly continued to the general election, where her opponent was Cynthia Platzer. Platzer eventually won the election.

Following the primary, Kelly, on several occasions, solicited Simasko's support for her judicial campaign against Judge Platzer. On the first occasion, Kelly telephoned Simasko and "asked Steve [Simasko] . . . if he would be willing to support or endorse me. And he said something to the effect he didn't have a dog in the race, he was just tired and he just needed to sit back and not do anything."

Kelly next approached Simasko in the Prosecutor's Office during work hours. During this second solicitation, Kelly also asked Simasko to persuade his brother, Frank Simasko, a

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[1] Judges Deegan, Adair and Kelly (who is the husband of Respondent Mary Kelly) appointed George to the position of Prosecutor.

[2] There is no question in this case that Peter George and the Kellys (Mary Kelly and her husband, Judge Daniel Kelly) were close personal friends. George testified that he is a social friend of the Kellys and has known them both since they were interns in the Prosecutor's Office. Kelly testified that both she and her husband are close personal friends of Peter George. The families vacationed together in Aruba and Peter George and Daniel Kelly once shared office space.

local attorney, not to support Kelly's opponent, Cynthia Platzer. Kelly expressed to Simasko her displeasure concerning his brother's support of Platzer, indicating that she and her husband (Judge Daniel Kelly) "took it personally."[3] Kelly told Simasko if he could not prevail upon his brother to cease and desist his public support of her opponent then, in return, she wanted Simasko's public support to level the playing field. Kelly told Simasko "does he (Frank Simasko) realize what's going to happen to his practice?" Simasko told Kelly that he was sorry that she felt as she did, but he again reiterated to her that he did not wish to support any candidate in the race. As she was leaving his office, Kelly responded, "this won't be a nice place for you to work."

In addition to the direct solicitations by Kelly, Simasko was approached by another co-worker, Senior Assistant Prosecutor Joe McCarthy, who was active in the Kelly campaign. McCarthy told Simasko that the Kellys were "really upset" with Simasko and his brother. McCarthy instructed Simasko that he needed to curtail his brother's support of the Platzer campaign and told him that "this would not happe in my family." McCarthy reminded Simasko that Kelly was his supervisor and questioned whether Frank Simasko knew "what they'll do to him?" When Simasko did not change his position, McCarthy left Simasko's office.

Kelly learned late on the night of the general election held on November 5, 2002 that she had lost the race to Judge Platzer. Kelly learned of the results while holding an election eve gathering at the Thomas Edison Inn. After learning of the loss, Kelly walked up to a group of people and said, "[t]hat fucking Simasko is done."

Following the general election, Simasko met with George and Kelly on December 4, 2002 to discuss his annual performance evaluation. This was the first occasion in the

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[3] Plaintiff's brother appeared in print ads supporting Cynthia Platzer.